JOHNBOSCO CHINEDU AUGUSTINE v. PP

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
KAMARDIN HASHIM J
[CRIMINAL APPEAL NO: B-05-95-04-2014]
28 JANUARY 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in – Appeal against conviction and sentence – Absence of written judgment – Whether rights under art. 5 of Federal Constitution compromised – Whether miscarriage of justice had been committed in sentencing accused – Whether conviction safe – Courts of Judicature Act 1964, s. 60*

CRIMINAL PROCEDURE: *Judgment – Grounds of – Absence of written judgment – Whether rights under art. 5 of Federal Constitution compromised – Whether miscarriage of justice had been committed in sentencing accused – Whether conviction safe – Courts of Judicature Act 1964, s. 60*

The appellant was charged at the High Court for trafficking in dangerous drugs, *to wit*, 562.3g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the trial, the appellant was found guilty by the Judicial Commissioner ('JC'). Upon conviction, the appellant was sentenced to death. Hence, this appeal. The appellant submitted that he had been deprived of a fair trial when the JC did not provide reasons for convicting the appellant. The issue that arose was whether the JC was in breach of s. 52(1) of the Courts of Judicature Act 1964 ('CJA') for not writing the grounds of her decision. Because of that omission or failure, it was argued that the appellant was not able to comply with s. 53(2) of the CJA and as such, the appellant had difficulties in filing his petition of appeal.

Held (allowing appeal)
Per Kamardin Hashim J delivering the judgment of the court:

(1) Without the grounds of judgment or decision by the JC, the appellant had been prejudiced and his right under art. 5 of the Federal Constitution had been compromised (*Lee Kwan Woh v. PP*, *refd*). A substantial miscarriage of justice had occurred and the conviction against the appellant was not safe. The court was mindful of its powers as set out in s. 60(1) of the CJA, whether to 'confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion … or may make such other order … may seem just, and may by that order exercise any power which the trial court might have exercise'. The conviction and sentence of the High Court was thus set aside. (paras 16, 17 & 18)

[Case remitted back to the High Court for a retrial before another judge.]

A ***Bahasa Malaysia*** *Headnotes*

Perayu dipertuduh di Mahkamah Tinggi atas kesalahan mengedar dadah berbahaya, iaitu, 562.3g methamphetamine, di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada akhir perbicaraan, perayu didapati bersalah oleh Pesuruhjaya Kehakiman ('PK'). Atas sabitan, perayu
B dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu menghujahkan bahawa dia telah dilucutkan hak untuk mendapatkan perbicaraan adil apabila PK tidak memberikan sebab untuk mensabitkannya atas kesalahan. Isu yang timbul adalah sama ada PK melanggar s. 52(1) Akta Mahkamah Kehakiman 1964 ('AMK') kerana tidak menulis alasan keputusannya. Berdasarkan
C ketinggalan atau kegagalan itu, dihujahkan bahawa perayu tidak dapat mematuhi s. 53(2) AMK dan dengan itu, perayu menghadapi kesukaran untuk memfailkan petisyen rayuan.

Diputuskan (membenarkan rayuan)
Oleh Kamardin Hashim H menyampaikan penghakiman mahkamah:

D

(1) Tanpa alasan penghakiman atau keputusan PK, telah diprejudiskan dan haknya di bawah per. 5 Perlembagaan Persekutuan telah dikompromi (*Lee Kwan Woh v. PP*, *dirujuk*). Satu salah laksana keadilan yang besar telah berlaku dan sabitan perayu tidak selamat. Mahkamah ini prihatin
E terhadap kuasa-kuasanya yang termaktub dalam s. 60(1) AMK, iaitu sama ada untuk 'confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion … or may make such other order … may seem just, and may by that order exercise any power which the trial court might have exercise'. Sabitan dan hukuman Mahkamah Tinggi dengan itu diketepikan.

F

[Kes dirujuk semula ke Mahkamah Tinggi untuk perbicaraan semula di hadapan hakim lain.]

Case(s) referred to:
Abdollah Saofi v. PP (Criminal Appeal No. 05-204-09-2012) (Unreported) ***(refd)***
G *Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC* ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Mohamad Deraman v. PP [2011] 3 CLJ 601 CA ***(dist)***
Rengarajan Thangavelu v. PP [2015] 1 CLJ 993 CA ***(dist)***
Thong Ah Fat v. PP [2012] 1 SLR 676 CA ***(refd)***

H **Legislation referred to:**
Courts of Judicature Act 1964, ss. 52(1), 53(2), 60(1)
Criminal Procedure Code, s. 308
Dangerous Drugs Act 1952, s. 39B(2)
Federal Constitution, art. 5
Rules of the Court of Appeal 1994, r. 61(1)(e)

I

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Jean Sharmila Jesudason; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-146-07 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim J:

[1] The appellant, a Nigerian national was charged at the Shah Alam High Court for trafficking in dangerous drugs, *to wit* 562.3g of methamphetamine, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The charge read as:

> Bahawa kamu pada 13/11/2011 jam lebih kurang 11.00 malam, di kawasan Tuntutan Bagasi G, Balai Ketibaan, Aras 3, Bangunan MTB KLIA, di dalam Daerah Sepang, dalam Negeri Selangor, telah didapati mengedar dadah berbahaya iaitu 562.3 gram Methamphetamine dan oleh demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] At the end of the trial, the appellant was found guilty by the learned Judicial Commissioner ('the learned JC'). Upon conviction, the appellant was sentenced to the mandatory death penalty by hanging. Hence, this appeal before us.

[3] The salient facts were these. The appellant was arrested at the KLIA on 2 October 2011. Before that, the appellant was seen pushing a trolley with three bags on it and heading toward the Customs exit examination counter. The appellant was stopped and asked to scan the three bags. There were no suspicious images seen. The appellant was then brought to an examination room.

[4] In the examination room, all the three bags were searched. One of which was a plastic bag written with 'Rainbow Dot' (P9). In it was a Panasonic box (P9B). It had a home theatre set. Koperal Ozaini bin Othman (SP2) then checked a speaker (P9B1). Inside it was found a plastic packet containing crystalline substance which formed the subject matter of the charge.

[5] Learned counsel for the appellant canvassed only one issue before us, that is, the appellant had been deprived of a fair trial when the learned JC did not provide reasons for convicting the appellant. It was submitted before us that the learned JC was in breach of s. 52(1) of the Courts of Judicature Act 1964 ('CJA') for not writing her grounds of her decision. Because of that omission or failure, it was argued that the appellant finds difficulties to comply with s. 53(2) of the CJA. As such, the appellant has difficulties in filing his petition of appeal.

[6] Learned counsel further contended that with no written grounds, the appellant has suffered great injustice. Since the appellant had been sentenced to death by hanging, he does not know the reasons accompanying such decision especially in the followings:

(i) the appellant does not know whether the learned JC had considered the submissions made by his counsel;

(ii) the appellant does not know why he was convicted and sentenced to death;

(iii) that because of no reasons given by the learned JC the appellant finds great difficulties in prosecuting his appeal; and

(iv) that there is no judicial accountability and responsibility.

[7] Relying on the Singapore Court of Appeal case of *Thong Ah Fat v. PP* [2012] 1 SLR 676; Malaysian Federal Court's decisions in *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625; *Abdollah Saofi v. PP* (Federal Court Criminal Appeal No. 05-204-09/2012) and few other cases cited, learned counsel further argued that without grounds of judgment, the appellant will be prejudiced as the appellant would lose one tier of the appeal process.

[8] On the other hand, learned deputy urged us to review the facts of the case by using our discretion provided under r. 61(1) of the Rules of the Court of Appeal 1994, which reads:

> (1) As soon as practicable after filing of a Notice of Appeal in his Registry, the Registrar of the High Court shall forward to the Registrar of the Court at Kuala Lumpur particulars of the proceedings in the High Court in Form 7 in the First Schedule together with seven copies of the following papers:
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> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) where the trial or appeal has been by a Judge alone a written judgment delivered by the trial Judge or where no such written judgment has been delivered a statement in writing by the trial Judge of the grounds of his decision; and...

[9] The learned deputy submitted that there was no prejudice occurred to the appellant in this case as the evidence pointing to the appellant was strong and overwhelming. Furthermore, learned deputy argued that the appellant was represented by an able counsel during the trial. Learned deputy finally urged us to follow this court's earlier decision in the case of *Mohamad Deraman v. PP* [2011] 3 CLJ 601.

Our Decision

[10] In the case of *Thong Ah Fat v. PP* (*supra*), the Singapore Court of Appeal gave four compelling reasons why there ought to be reasons given by the trial judge making a decision. At pp. 687 and 688 of the said case, VK Rajah JA said as follows:

> 20. There are several reasons for recognising a duty to give reasons. The English Court of Appeal in *Coleman* identified three such reasons. First, Henry LJ said (at 403):
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> > Giving reasons is a salutary discipline to all whose judgments may adversely affect their fellow citizens. The giving of reasons ensures that the parties' relevant submissions are confronted and not avoided.
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> He quoted Lord Donaldson MR in *Tramountana Armadora SA v. Atlantic Shipping Co SA* [1978] 2 All ER 870 at 872, who said that "[h]aving to give reasons concentrates the mind wonderfully". The recognition of a duty to give reasons, it is hoped, will lead to increased care in the dealing with submissions and analysis of evidence, giving rise to sounder decisions. As Meagher JA stated in *Beale v. Government Insurance Office of NSW* (1997) 48 NSWLR 430 ("*Beale*") at 442, "[t]he requirement to provide reasons can operate prophylactically on the judicial mind, guarding against the birth of an unconsidered or impulsive decision". As the fact-finder is reminded through the exercise of stating his reasons that he is accountable for how he decides, mis-analysis of the evidence will be more readily avoided. In short, it has a "self-educative" value, hones the exercise of judicial discretion and encourages judges to make well-founded decisions: see Doron Menashe, "*The Requirement of Reasons for Findings of Fact*" (2006) International Community L Rev 223 at 230.
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> 21. Secondly, the duty ensures that when the parties leave the court, after having had their day in court, they know why they have won or lost: see *Coleman* at 403. From a broader perspective, the legal profession and the community may ordinarily have legitimate interests in knowing these reasons. It enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future. It was also observed in *Beale* at 442 that since "[d]ecisions of courts usually influence the way in which society acts..It is better to understand why one should act [or not act] in a particular way".
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> 22. Thirdly, the duty to give reasons ensures that the appellate court has the proper material to understand, and do justice to, the decisions taken at first instance: see *Coleman* at 403. The appellate court should not "be left to speculate from collateral observations as to the reasoning upon which a critical decision is made, when the trial judge can and ought directly to reveal it": see *Wright v. Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 701. In *Pettitt v. Dunkly*, Moffitt JA supported this third reason in rather different terms. He observed that the first instance judge not only has a duty to determine and enforce the rights of parties at a trial, but also a duty to, within limits, preserve and facilitate any right of

A appeal from his decision which a party may have (*Pettitt v. Dunkley* at 388). Unlike Henry LJ in *Coleman*, Moffitt JA grounded the duty to give reasons entirely on the right of appeal, and held that there was no judicial duty to give reasons except where such a duty could be related to a right of appeal. But his narrow view was repudiated in *Soulemezis* at 269 and *Housing Commission of New South Wales v. Tatmar Pastoral Co Pty Ltd And* B *Penrith Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 ("*Housing Commission of NSW*") at 386. We prefer the view of Henry LJ, who took a broader view of the policies underlying the duty, to that of Moffitt JA in *Pettitt v. Dunkley*. The duty ordinarily applies even where there can be no appeal against that decision.

C 23. Additionally, a fourth reason was provided by Kirby P in his celebrated dissenting judgment in *Soulemezis* ([19] *supra*) at 258. Kirby P penetratingly observed that the requirement for judges to give reasoned decisions which can be debated, attacked and defended acts as an important constraint on the judiciary's exercise of power. The duty to articulate reasons is a means of curbing arbitrariness, and is a facet of judicial accountability: see *Beale* D at 442 (per Meagher JA).

24. Judicial accountability is associated with the notion of open justice. Hence, another foundation of the duty to give reasons is the principle that justice must not only be done but it must be seen to be done: see *Soulemezis* at 278 (per McHugh JA). Where the reasons for an adverse E ruling are not revealed, the litigant may think that the judge has not really understood his case, and the public may form the same opinion. The withholding of reasons may therefore affect the legitimacy of the decision. In our view, the requirement to give reasons beneficially increases the transparency of the judicial system.

F **[11]** Back to our own jurisdiction, Arifin Zakaria CJ (Malaya) (as His Lordship then was) in *Dato' Seri Anwar Ibrahim v. PP* (*supra*), in a similar vein, had this to say about the important of giving reasons of decision:

[6] In this connection, we wish to state that grounds or reasons for a judgment are required so that parties, particularly the unsuccessful one, G would know why the judge arrived at the decision the way he did. The reason need not be long especially when the outcome is obvious. It can be obvious when facts are not in dispute and the law is well established. In such a case, all that is needed is the conclusion and his reason in support of the same. This is not to say that in all cases judgments should be brief and concise. Where facts are disputed, the judge has to discuss H and analyse them. Where the law is seriously doubtful, he should argue it out before arriving at a decision. More often than not, judgments become long because facts which are sometimes unnecessary are repeated. Laws and authorities which are well established are recited over and over in the same judgment. Statements are often repeated in different ways. Sometimes, this is intentionally done to stress a point. It only makes the I grounds long and unwieldy. Having said that, this is not to discourage judges from writing comprehensive grounds, if they have the ability and time to do so.

[7] ...

[8] We agree that as a general rule, it is incumbent upon the court making a decision to provide reasons for its decision as litigants are entitled to the same. But this ground of judgment, as we said earlier, need not be long, depending much on the subject matter in issue. In some instances, short and concise grounds of judgment will suffice. As was observed by the Privy Council in *Wendal Swann v. Attorney General of the Turks and Caicos Islands* (Privy Council Appeal No 43 of 2008 delivered on 21 May 2009): "Any court giving a decision after submission have been made has a clear duty (at least in the absence of the parties expressly or impliedly agreeing or otherwise) to give not only a decision, but also the reasons for that decision. *Sometimes very shortly expressed reasons are appropriate, or at least acceptable. In the present case, for instance, provided of course that it represented its reasoning, the Court of Appeal could have complied with its duty by stating that the Chief Justice's decision was right in the sense that it was the only correct outcome and/or because it was a decision which he was entitled to reach as a matter of discretion, and that his reasoning was unassailable*. However, it appears that the Court did not go even that far: if that is indeed the case, the Court of Appeal failed to do its duty. This should not happen again.

(emphasis added).

[12] Finally, in the case of *Rengarajan Thangavelu v. PP* [2015] 1 CLJ 993, this court dealt with s. 308 of the Criminal Procedure Code when there was no ground of judgment been written by the trial judge. In that case, this court had decided as follows:

[13] We do not find any merit at all in ground (i) and (ii) of the complaint above. As to the ground (iii) in relation to there being no grounds of judgment, we have in the earlier part of the judgment dealt partly in respect of the jurisprudence relating to 'no grounds of judgment'. In the case of *Pembinaan Majujaya & 2 Ors v. Lau Tiong Ik Construction Sdn Bhd* [2008] 1 LNS 29, Hamid Sultan JC (as he then was) has documented all the relevant cases in respect of 'no grounds', 'no sufficient grounds' and/or 'no speaking judgment' and had considered the Malaysian, Indian and English cases. We do not wish to repeat save to say that the instant case is not one where there is no ground at all. If there is no ground at all it will be in breach of s. 308 of the CPC. If there is a breach of s. 308, a conviction cannot be sustained at all as it will breach art. 5 of the Federal Constitution which says:

> 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[14] In such a case, the court will be duty bound to consider an acquittal or send it back for retrial as the conviction on the face of the record will be illegal. (See *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393). In the instant case and on the facts of the case, there is no statutory breach. Our reasons *inter alia* are as follows:

(i) The learned judge has given brief grounds to satisfy s. 308;

A (ii) On the facts and the law in respect of the instant case the grounds is self-speaking. In this case ...

(iii) There is little doubt that the Prosecution had established a *prima facie* case of trafficking at the prosecution stage. On the facts, the grounds stated by the learned trial judge is sufficient to satisfy s. 308 ...

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[13] We have gone through the notes of proceedings in detail in three volumes, but we can't even find any statement in writing by the learned trial JC of the grounds of her decision, either at the *prima facie* stage or even at the final stage of her decision. What we have beside the order made by the C learned JC as at p. 7 of the record of appeal at vol. 1, was that an order by the learned JC for the appellant to enter his defence (at p. 3 additional record of appeal vol. 1) and a finding that the appellant was found guilty and convicted (at p. 25 of additional record of appeal vol. 1).

[14] Learned deputy cited of *Mohamad Deraman v. PP* (*supra*) and urged us D to affirm the conviction and sentence on the appellant based on the totality of the evidence. We beg to differ. In the abovementioned case, there were rulings made by the trial judge at both stages of the trial. As observed by the Court of Appeal in that case that there was "a 35-line 'keputusan' ('decision') found the appellant guilty and acquitted and discharged his co-accused", E beside the strong and overwhelming evidence against the appellant in that case.

[15] Likewise, in the case of *Rengarajan Thangavelu v. PP* (*supra*), this court affirmed the conviction because the learned trial judge has given brief grounds satisfying s. 308 of the CPC and as such it has complied with the minimum F requirement under r. 61(1)(e) of the Rules of the Court of Appeal 1994. The brief grounds given by the learned trial judge amount to "a statement in writing by the trial judge of the grounds of his decision" as envisaged in that rule.

[16] Back to our present case, we agree with learned counsel that without G the grounds of judgment or decision by the learned JC, the appellant had been prejudiced and his right under art. 5 of the Federal Constitution had been compromised (see *Lee Kwan Woh v. PP* [2009] 5 CLJ 631). We are satisfied that a substantial miscarriage of justice has occurred and the conviction against the appellant in this case is not safe.

H

[17] We are mindful of our powers as set out in s. 60(1) of the CJA, whether to "confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion ... or may make such other order ... may seem just, and may by that order exercise any power which the trial court might have exercise".

I

[18] For the reasons stated above, we unanimously allowed the appeal. The conviction and sentence of the High Court was set aside. The case to be remitted back to the Shah Alam High Court for a retrial before another judge. We ordered the appellant to be remanded at the Sungai Buloh Prison pending disposal of his retrial.